

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, et al,
Plaintiff, No. 1:11cv483

vs.

NCR, INTERNATIONAL PAPER COMPANY,
WEYERHAEUSER,
Defendants.

Before:

THE HONORABLE HUGH BRENNEMAN, JR.,
U.S. Magistrate Judge
Grand Rapids, Michigan
October 22, 2014
Motion Proceedings

APPEARANCES:

Varnum Riddering Schmidt & Howlett
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On behalf of the Plaintiff;
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On behalf of the Defendant IP.

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8 REPORTED BY: MS. KATHY J. ANDERSON, RPR, FCRR
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October 22, 2014

PROCEEDINGS, 9:12 a.m.

THE COURT: Good morning, gentlemen.

MR. BRODY: Good morning, Your Honor.

MR. FIELDS: Good morning, Your Honor.

THE COURT: I had a dentist appointment yesterday, and one of those routine appointments where they take all the x-rays and everything seemed fine until they found a little shading in an inlay I had; inlay was quite old. The dentist told me that it looked like there was a little decay there and they would have to drill that inlay out and put a cap in. But, fortuitously, Tim told me that there was an opening at 8:30 the next morning, which is today, and he could get me in. It's an hour and a half process, one of two steps. And I said, "Tim, what makes you even believe that I would want to cancel my schedule for tomorrow morning and rush in here at 8:30, sit in your chair for an hour and a half where you drill in the first of two steps, pay you \$1,500 because my insurance doesn't cover crowns, and are you serious?" And then I looked at my calendar, and I thought perhaps I'm being too rash. But on the off chance that somebody had flight plans and was actually here this morning because of this motion, I thought in all fairness I probably shouldn't cancel the morning, and so here we are. I did put off the dentist appointment until a little bit later. So, anyway, it's good to see all of you today.

1 This is Georgia-Pacific's motion to compel. Only five
2 attorneys this morning. I'm disappointed. But we do have
3 enough table space for a change in this small courtroom. So
4 that's good. There is always a plus.

5 I read the, I read the briefs of the three that have
6 submitted the briefs, so I think we're ready to go. Counsel,
7 please proceed.

8 MR. BRODY: Yeah, I was going to say you've got the B.
9 team here today, but I don't want to insult Mr. Parker, so I
10 appreciate --

11 THE COURT: I don't think there is a B. team among all
12 the attorneys here. I think there's just a surplus of an A.
13 team.

14 MR. BRODY: Your Honor, I don't have a whole lot to
15 add to what is in the brief. I do want to dispel this notion
16 that we are freeloaders looking to take advantage of other
17 people's work.

18 First of all, we have abided by the party's agreement.
19 We have voluntarily produced at our expense approximately
20 75,000 pages of documents that we have obtained from public
21 sources. But I think even more importantly, on this specific
22 issue of the MDEQ documents that are at issue, the background
23 is very important because NCR said, hey, we are going to copy
24 this entire site file. Our response was, we have already
25 produced a lot of that; we don't want to pay to duplicate that

1 effort. Let's find another way. Let's streamline this. That
2 was the last we heard from them. They copied the entire thing.

3 Now they want to say, well, because we didn't want to
4 share in an unnecessary and excessive cost, we can't get these
5 documents, even though they are relevant, and even though they
6 are responsive to our discovery requests.

7 And really, Your Honor, that last point I think goes
8 to the heart of this issue, because even apart from the party's
9 agreement, these documents are responsive to a request that had
10 been served on both NCR and IP. And we specifically cited to a
11 number of those in our brief, but there are many others that
12 deal specifically with the MDEQ. Requests relating to
13 submission by IP or others made in response, the information
14 requests from the MDEQ related to this site, requests for
15 production dealing with any notice of violation from MDEQ,
16 requesting with communications between NCR and MDEQ.

17 So there is no question that the documents that we are
18 asking be produced are responsive to our discovery requests.
19 And they don't really argue otherwise. NCR halfheartedly said,
20 well, your requests are too broad. IP didn't challenge it at
21 all in their response.

22 But the point is, these are responsive documents that
23 have to be produced. And they can do it now at basically no
24 cost. They are the ones who decided to go through the expense
25 on the front end. And that was their decision and they are

1 free to do that. But now all they have to do to comply with
2 their obligation under the discovery rules is copy a disk or
3 send us a flash drive at basically no expense.

4 On the issue of NCR's claim of work product, there was
5 no law cited in their brief for this proposition that the MDEQ
6 documents that weren't created by or for NCR and not in
7 anticipation of this litigation are work product, but even if
8 they were, they waived that protection. IP has that exact same
9 set of documents, so any claim that there is some work product
10 protection that precludes them or allows them to not produce
11 them, that's baseless. And, frankly, they have offered to give
12 them to us if we write them a check for 16 grand. So I think
13 this work product argument is a red herring.

14 THE COURT: You're saying they waived that because
15 they have produced the same documents to IP.

16 MR. BRODY: Exactly. And one final point that we
17 raised and that was addressed I believe by NCR is we did ask
18 that they produce all documents they have received from the
19 MDEQ or other public sources. And my point there, Your Honor,
20 would be if they're responsive to our discovery requests, they
21 need to be produced. And that's under the discovery rules, not
22 necessarily under the agreement that the parties had been
23 abiding by for the duration of this case.

24 So we're here today to ask you to grant the motion and
25 order either NCR or IP to produce an electronic copy of the

1 documents at issue. And as you saw in the papers, we are
2 asking that that be done right away because of the deposition
3 that we have scheduled for October 29th.

4 THE COURT: First of all, what is the discovery
5 request that you're pointing to specifically where you seek
6 these particular documents.

7 MR. BRODY: If you look at page 5 and 6 of our brief,
8 Your Honor, we talk about the requests for production that were
9 served on IP. And those are numbers 54, 63, 67, and 79. And I
10 have referenced some additional ones here this morning that I'm
11 happy to give you the citations for.

12 THE COURT: All right.

13 MR. BRODY: And those would be our requests to IP
14 number 35, number 51, number 52, number 59, and number 77. And
15 with respect to NCR, those would be request numbers 1 and 2 as
16 well as our general request for any documents relied on in
17 answering our interrogatories and requests for admissions.

18 THE COURT: I have the ones you have stated what they
19 were as far as the first four going to IP. The remaining ones
20 to IP and the two to NCR, are those stated here in the brief?

21 MR. BRODY: They are not set forth specifically in the
22 brief, Your Honor.

23 THE COURT: Will I find those in the defendant's
24 briefs?

25 MR. BRODY: I don't believe that they cited those,

1 Your Honor.

2 THE COURT: Just a moment. Who is asking for the
3 \$16,000, NCR or IP or both?

4 MR. BRODY: I think that NCR fronted it. They can
5 speak to that. And then got a contribution from IP, so I
6 believe it would be NCR.

7 And if I could back up just for one moment, Your
8 Honor. We have the requests set forth in our brief that I
9 believe would cover all the materials we are talking about. In
10 response NCR claimed, well, those are just overly broad. So I
11 wanted to give the Court some examples of some other requests
12 that are specifically targeted to MDEQ documents. But the
13 overarching point is these are responsive to the ones we have
14 already set forth in our briefing.

15 THE COURT: Which are the four that you sent to IP.

16 MR. BRODY: Correct.

17 THE COURT: But your motion goes to NCR as well.

18 MR. BRODY: It goes to both. Yeah. Frankly, we don't
19 care who sends us a disk of those documents. We both have
20 possession, custody and control of it. And it's easy enough to
21 actually just send us a link to a secure website, as they did
22 last night in producing some other documents.

23 THE COURT: I guess my point goes to your motion to
24 compel which normally is directed to a specific discovery
25 request, and as far as NCR is concerned, these first four that

1 you lay out in your brief don't go to NCR. They go to IP.

2 MR. BRODY: Correct.

3 THE COURT: So I was wondering what the language was
4 that NCR considers too broad, and that would be either 1 or 2,
5 and I don't have that language in front of me.

6 MR. BRODY: And they didn't cite to any specific
7 example of what was too broad. They made the generic blanket
8 statement in their brief, Your Honor.

9 THE COURT: But I can't see that language to analyze
10 it. All right.

11 Let's go back to this agreement. You maintain today
12 and in your brief that you've abided by the agreement. As I
13 understood their briefs, and they certainly are free to
14 articulate their argument better than I'm sure I could, that
15 there is no agreement in Phase II, the agreement never carried
16 over. That, in fact, the discovery in the first part was
17 apparently smaller and that this discovery was substantially
18 larger and that's why NCR was asking for contributors before it
19 undertook the discovery, and that you specifically did not want
20 to contribute. Apparently two parties were willing to
21 contribute and you and I think Weyerhaeuser did not want to
22 contribute. So out front, you were put on notice that there
23 was no particular agreement to share these documents unless you
24 contributed and you didn't contribute.

25 MR. BRODY: Well, a dispute did arise in the context

1 of these documents. If you look at Exhibit 4 to our brief,
2 that appears to be the exchange of correspondence where we say,
3 we have this agreement, and Mr. Lisner disagrees with that.
4 But if you look in our brief, Your Honor, it's not simply we
5 don't want to contribute anything, it's let's find a better way
6 to do this, because we, Georgia-Pacific, have already produced
7 a large number of these documents, so let's streamline it,
8 let's not spend \$50,000 to get largely duplicative materials,
9 and then we heard nothing about it after that point in time.

10 THE COURT: Was that after they asked you to
11 contribute some money to it and you declined?

12 MR. BRODY: I believe it was, Your Honor, yes. That
13 would be set forth in our brief.

14 THE COURT: And you said let's find a better way, and
15 you heard nothing else.

16 MR. BRODY: Correct.

17 THE COURT: So how do you go from that point to
18 understanding that there was some agreement?

19 MR. BRODY: Well, we had an agreement all along, Your
20 Honor. What we are saying now is, well, they are trying to
21 dispute it in specific context of this motion. We are saying
22 it's improper for them to dispute it in the context of this
23 motion because up to that point in time that's what everyone
24 had been doing, including us.

25 THE COURT: You're saying at that point they tried to

1 change what had previously existed by saying as to these MDEQ
2 documents they wanted to change the ground rules by charging
3 money.

4 MR. BRODY: Yes.

5 THE COURT: And you did not want to change the ground
6 rules.

7 MR. BRODY: And it wasn't just changing the ground
8 rules. Again, it was why are we taking what we already have
9 98 percent of and paying \$50,000 to copy all this. Why would
10 anybody do that? Let's find a better way, and they apparently
11 had no interest in that because we didn't hear anything back
12 from them on that front.

13 THE COURT: As far as Phase II of the case is
14 concerned, were there any other sets of documents that were
15 exchanged under the agreement that you had in Phase I of the
16 case?

17 MR. BRODY: Your Honor --

18 THE COURT: Where you had this agreement that
19 everybody had an understanding.

20 MR. BRODY: I believe that some of the 75,000 pages of
21 documents that we have disclosed were in Phase II, but I'm not
22 certain about that. So I don't want to make that
23 representation to the Court.

24 THE COURT: Okay. Now, as far as these MDEQ documents
25 are concerned that you're talking about, they say they are all

1 available to you, they want 16,000 as your share of the cost,
2 you don't want to pay that because you don't need the entire
3 set of documents, you want part of those documents, but there
4 would be a big effort in sorting out which of those documents
5 you want, and the only practical way to do that is to obtain
6 all of the documents and then go through those as you need
7 them.

8 MR. BRODY: And we're willing to do that. We'll sort
9 through and see what's duplicative and what's not. Again, all
10 we want is a disk that has the file on it and we'll take care
11 of the rest at that point, Your Honor. They won't need to do
12 anything else.

13 THE COURT: What would be the practicality of doing
14 that and then returning the document or setting out those
15 documents, setting those documents aside, and paying for those
16 documents after the fact?

17 MR. BRODY: Paying for the non duplicative documents?

18 THE COURT: Yes, after you sorted them out.

19 MR. BRODY: I would assume we could do that. I don't
20 think it's going to be a large number. And doing that would be
21 contrary to what we have been doing throughout this case, but
22 if that's the Court's decision, I'm sure we would be willing to
23 do that. It's just we don't want to pay for duplicative
24 documents.

25 THE COURT: You wouldn't be if you did that.

1 MR. BRODY: Correct.

2 THE COURT: I'm just asking.

3 MR. BRODY: Sure.

4 THE COURT: All right.

5 MR. BRODY: Again, I go back to the point of they
6 should be provided in response to our discovery requests, and
7 if that's the case, we are under no obligation to pay them to
8 produce them. The general rule is the party producing pays.
9 And that's separate from our agreement that we had throughout
10 this case.

11 THE COURT: Let's go back then to your request. Does
12 your request seek documents that might already be in your
13 possession however? Some of these requests look like they
14 might be asking for documents that are in fact duplicative.

15 MR. BRODY: I'm sure we do have some of those
16 documents, Your Honor. You're speaking of the discovery
17 requests referenced in our brief?

18 THE COURT: Well, there are those four.

19 MR. BRODY: Yes.

20 THE COURT: And then the other list that you gave me
21 which I don't have in front of me so I don't know. But I
22 assume that if you looked at all of those documents, a lot of
23 those would be requests for documents that you already have,
24 whether they know which of those documents you already have or
25 not, I don't know. But a lot of those you might very well have

1 obtained from other sources.

2 MR. BRODY: I think that's correct, yes.

3 THE COURT: So you would be seeking duplicative
4 documents there at their cost.

5 MR. BRODY: Well, what we would typically do in that
6 situation is say we already have these documents, you don't
7 need to send us additional copies, just as a practical matter.

8 THE COURT: What point in the production would you do
9 that? Because you've already asked for them.

10 MR. BRODY: Well, presumably they know the documents
11 that we had produced that we have already obtained from the
12 MDEQ. So they wouldn't need to reproduce those for us.

13 THE COURT: All right. Thank you. Mr. Fields.

14 MR. FIELDS: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. FIELDS: I thought I would start out with the
17 rules, kind of old fashion that way, and briefly reference that
18 the motion is brought under Rule 37, which in subparagraph
19 (A)(iii) gives the Court the power to issue an order to compel
20 either a disclosure, a response, or something pertaining to a
21 deposition. And since we don't have a deposition at stake here
22 or a disclosure, it's a response. And I make that obvious
23 point because the rule doesn't talk about enforcing an
24 agreement. It talks about enforcing discovery requests to
25 which an improper response or an incomplete response has been

1 given. So we start with that rule.

2 And the other rule I wanted to bring to the Court's
3 attention, not that I need to probably, is Local Rule 7.1(B)
4 which says when you file a motion to compel, you need to attach
5 or quote verbatim the request and the response. And that's to
6 allow the Court and all the other parties to focus in on what
7 is the deficiency here, or is there one. And so your questions
8 already point out an obvious problem with this motion to
9 compel, at least with respect to NCR; is that no motion has
10 been filed that is quoted, or attached a request to NCR, nor
11 has it attached a response, and we're all operating in a
12 vacuum.

13 And I think that really is about all I need to say
14 about the motion because the MDEQ thing is a fairly focused
15 issue. But my further problem is that the order that's
16 attached to the motion, the proposed order, requests that the
17 Court order -- well, first of all, "Objections by defendants
18 are deemed waived," so apparently there is going to be some
19 kind of blanket work product waiver for reasons that I don't
20 understand because of course with respect to NCR, we don't even
21 have a properly tendered request that's in the record. And,
22 "NCR shall immediately produce all relevant documents collected
23 from public sources to Georgia-Pacific," which seems to me to
24 be a little more sweeping than just the MDEQ documents. And
25 I'm a little leery of sitting down at this point if we're going

1 to find out there is going to be an order that is that
2 sweeping, so sweeping that let's say hypothetically last night
3 an NCR associate at the Cravath firm went on the web and
4 printed out something that all of a sudden that is swept into
5 something that was supposed to be just focused issue with the
6 MDEQ because that was the reason for the expedited hearing.

7 So I want to just make a few more comments to make the
8 record.

9 With respect to the MDEQ, just so that the Court has
10 the full background, NCR requested these documents through a
11 FOIA request to the MDEQ. The response was there are an
12 enormous number of documents and it's going to cost you.
13 That's when NCR proposed and International Paper agreed to
14 share costs. And I mention this because I think it shows in
15 spades that there was no agreement in Phase II to produce
16 things that one obtained from public sources. There was an
17 agreement during Phase I, and in fact if you look at
18 Mr. Garrou's letter which is attached as Exhibit 1 to
19 Georgia-Pacific's motion, it references Phase I discovery. But
20 during Phase II there was no such agreement. I don't believe
21 you'll find it in the joint status report that led to the
22 discovery schedule and the case management order in Phase II,
23 and furthermore, the fact that NCR was proposing to share costs
24 and International Paper agreed, tells us by the course of
25 conduct of the parties there was no such agreement. And the

1 fact that Georgia-Pacific said, we'll only pay if it's more
2 limited, shows that the course of the conduct of the party that
3 there was no such deal.

4 But in any event, I return back to Rule 37 which
5 authorizes and gives the Court authority to compel production
6 of an inadequate response, not an agreement.

7 Now, as far as Georgia-Pacific's contention that they
8 ever asked for this stuff, and this is a point that's made in
9 NCR's brief, the four illustrative requests that are at pages 4
10 and 5 of Georgia-Pacific's brief, don't hit the mark. None of
11 them ask for the MDEQ documents. They ask for other things.
12 It's theoretically possible that something within the MDEQ
13 production pertains to that, but it's theoretically possible
14 that any number of other things pertain to it. And I can tell
15 you this, the complete set of MDEQ documents don't overlap and
16 merge in any way with those requests.

17 As I pointed out, those requests were tendered to
18 International Paper, not NCR. So with respect to NCR, there is
19 really nothing to enforce here, and I think the Court should
20 deny the request with respect to the MDEQ.

21 But because of my concern about that request for the
22 other public documents, let me say as follows: Georgia-Pacific
23 has not filed a motion with any request to anybody that
24 pertained to public documents. They haven't cited or attached
25 any such requests to their motion. So there is nothing to

1 enforce here. They didn't raise this in the meet and confer,
2 so I'll say it another Local Rule 7.1(e) because that ought to
3 have been discussed. Only the MDEQ issue was discussed. And
4 there wouldn't have been any basis for expedited consideration
5 for that matter because the whole premise for this motion is
6 there is an MDEQ deposition coming, so, Judge, will you please
7 hurry up and let's have briefs. Well, that can't possibly be
8 the case for all public records.

9 And for all of these things, I'm going to maintain
10 there is a work product privilege at stake. As the Court
11 knows, there isn't any such thing as a limited waiver. And
12 I'll note that we are co-defendants with IP, and there is a
13 joint defense aspect to what is on the record. But with
14 respect to -- we are not even talking about a request to NCR
15 at this point. There is no request that is on the record for
16 purposes of this motion, not with respect to the DEQ, and not
17 with respect to the other public documents. And I'll be darned
18 if I stand here in court and waive in any way the work product
19 privilege for something that is not even in the record. I'm
20 just not going to do that.

21 If you have any other further questions, Judge, that's
22 all I had to say this morning.

23 THE COURT: Well, I understand this motion to be
24 directed to documents obtained from the MDEQ.

25 MR. FIELDS: I'm being careful, Judge, just because of

1 the nature and the language in the proposed order that was
2 submitted to the Court.

3 THE COURT: And I can understand that. You wouldn't
4 be doing your job if you weren't concerned. The focus of the
5 Court, however, is limited to the MDEQ. That's why the Court
6 has expedited this hearing. And so that the parties are aware,
7 that's the focus of the hearing this morning. And that's all
8 the focus is limited to. The third parties wanted other
9 documents, then I think we need to discuss that. But that's
10 the focus of these documents or this motion.

11 Now, I will say, and perhaps parenthetically, that the
12 Court is also concerned that this case keep moving along. And
13 I understand that we have a deposition coming up. But I don't
14 want to see us get bogged down. I want to get this matter
15 resolved.

16 The motion before the Court, and I'm not deciding the
17 motion yet because I have not even heard from International
18 Paper, but the motion appears to be one to compel, and
19 normally, as I think Mr. Fields has postured this, a motion to
20 compel is to compel discovery. And we normally think of that
21 as discovery that's been previously requested such as requests
22 to produce documents.

23 Here the request appears to also be broader than that;
24 it's a request to enforce an agreement, kind of piggy backed on
25 a motion to compel production of documents. Or shoe horn in to

1 a motion to produce documents.

2 Normally the Court doesn't enforce private agreements
3 made between the parties, but only enforces the Federal Rules
4 of Civil Procedure and discovery pursuant to those rules.
5 Which is why I asked at the outset what document requests were
6 at issue. Four were pointed out, some more were listed, but I
7 haven't actually seen those.

8 Now, that's a technicality, it's an important one
9 because it's hard to evaluate those since I haven't seen them.
10 Two of those pertain to NCR. The objection to those two by NCR
11 was, well, they are overly broad. That is not an
12 insurmountable problem. But as I understand it, Mr. Fields --
13 I don't understand it, I guess, is what is your position on
14 that? Are those requests 1 and 2 that were directed to NCR not
15 sufficient to encompass the documents that NCR has obtained
16 from MDEQ or not?

17 MR. FIELDS: I can't speak to it, Judge, because I
18 don't have those requests in front of me, and candidly will
19 state as local counsel have not flyspecked requests. I think
20 NCR's brief is referring to the four illustrative requests that
21 were at pages 4 and 5 of Georgia-Pacific's brief. And I don't
22 understand any other interrogatories to be in play here other
23 than this morning when they were alluded to on the record.

24 But I can't take a position until, I know it's a
25 technicality, but until I see the request and the response, I

1 can't take a position either. I haven't seen it. And I will
2 hasten to tell the Court that I don't like to come to court
3 unprepared and gave thought to reviewing the reams of written
4 discovery requests to see if I could deduce one or two
5 pertained, but there have been a lot of them. And I wasn't
6 even sure I could get a complete set.

7 Mindful, however, of what the Court has said about the
8 need to move things along, there's obviously another side to
9 this story because this motion does have four requests to
10 International Paper, and International Paper does make I think
11 some cogent points about the need to pay to play, and that it
12 may turn out that -- I mean I can't argue for International
13 Paper. It may be that the resolution to this motion could be
14 found through the completion of the hearing.

15 THE COURT: All right. Let me hear from International
16 Paper at this point.

17 MR. PARKER: Good morning, Your Honor. John Parker on
18 behalf of International Paper.

19 THE COURT: Good morning, Mr. Parker.

20 MR. PARKER: How are you?

21 THE COURT: I'm fine. How are you doing?

22 MR. PARKER: Well, I think I'm okay. I think now that
23 I have had the pleasure of being before Your Honor five or six
24 times in the last couple of months, and during that time you've
25 probably come to conclude that I may not be the brightest bulb

1 in the pack.

2 THE COURT: I never even thought along those lines.
3 Quite the contrary.

4 MR. PARKER: I assure you, Judge, if you grant
5 Georgia-Pacific's motion today it will resolve all doubt that
6 I'm an idiot. And here's why. When I was approached by NCR --

7 THE COURT: Let's not make this so personal. I would
8 hate to have my conscious would bother me if I --

9 MR. PARKER: I don't mean to go there.

10 THE COURT: -- dull bulb because I ruled in favor of
11 Georgia-Pacific. I would go home at night and anguish over the
12 fact that I had labeled Mr. Parker a dull bulb.

13 MR. PARKER: You would not be the first.

14 THE COURT: Then I have to worry about Mrs. Parker. I
15 would think maybe I granted her request to go on vacation just
16 because I felt sorry for her to be married to a dull bulb. No,
17 I didn't do that.

18 MR. PARKER: I need to order this transcript as well,
19 Judge, just for that purpose.

20 THE COURT: I did it on its own merits. He's a very
21 sharp bulb, a very bright bulb, as a matter of fact.

22 MR. PARKER: Well, let me at least explain why there
23 would be further proof that I'm not a very bright bulb.

24 When I was approached by NCR, as was Georgia-Pacific,
25 and Weyerhaeuser, and asked if International Paper wanted to

1 participate in the cost of copying these documents from the
2 MDEQ, I was told by NCR, as was Georgia-Pacific and
3 Weyerhaeuser, that would be extremely expensive to copy these
4 documents. Probably would cost about \$50,000. So I went back
5 to my client and I said, look, there are these documents from
6 the MDEQ. There may be some documents in there that are
7 duplicative of other documents. We don't know how many, if
8 any, until we see them. But there might be important documents
9 in there. What would you like to do? And they said, well,
10 let's share in that cost. So I went back to NCR, I said, fine,
11 we will share equally in the cost with as many parties as want
12 to participate in the copying of those documents.
13 Georgia-Pacific declined that opportunity, as did Weyerhaeuser.
14 And as a result, it ended up costing International Paper
15 \$24,480 for a set of those documents.

16 But the proof of the dull bulb is what I should have
17 done, according to Georgia-Pacific, was simply wait for NCR to
18 copy them totally at their own expense and then say no, no, no,
19 there is some agreement out there that requires you to give me
20 these documents for free, and I should have said that after NCR
21 went ahead and copied the documents even though they asked me
22 if I want to share in the costs beforehand.

23 There's -- I just don't see that, Judge, as the
24 appropriate course of action here. If Georgia-Pacific wants a
25 set of these documents, we would then divide the cost three

1 ways which means their share would be \$16,000, frankly 8,000 of
2 which would come to me and \$8,000 of which would go to NCR to
3 cover that one-third of the 24,000 plus we have each already
4 paid out for the cost of these documents.

5 Let me make just a few points on why I think the
6 motion to compel should be denied.

7 First, if Georgia-Pacific truly believed that there
8 was some Phase I agreement to produce all of these public
9 records voluntarily, they should have raised that with NCR
10 before NCR went out and copied the documents, and not after
11 they copied them. It just, I don't know, defies logic that you
12 would let somebody go ahead and spend what you knew to be
13 \$50,000 to copy them and then say after the copying was done,
14 aha, I got you, you need to give me my set for free.

15 Second point. Even if there is some general
16 agreement, or was some general agreement between the parties
17 about producing documents from public sources, and whatever
18 that may mean, that agreement was changed under the exceptional
19 circumstances presented here of \$50,000 being charged by the
20 MDEQ to copy these documents, and NCR approaching the parties
21 and saying, do you guys want in. And when you said no, I don't
22 want in because I think there might be duplicative documents, I
23 don't think after the fact you can say now you owe them to me
24 for free, or now I'm going to go through them and figure out
25 what's duplicative and what's not and only want to pay for some

1 small subset of the total cost.

2 Third, if you want to parse that Phase I agreement,
3 Judge, and I would suggest you shouldn't because it is a
4 private agreement between the parties, but even if you want to,
5 and you read the letter that went between the parties back in
6 Phase I, it talked about producing the documents. It didn't
7 talk about who would pay for them. It just said the parties
8 agree to exchange these documents when they get them from these
9 public sources. Again, didn't say who would pay for them.

10 Now, the practice admittedly in Phase I was that each
11 party just sent them to the other side without sending them a
12 bill for them. That's because, as Your Honor knows, if I have
13 a \$500 copy job, it costs me more money to follow up with
14 Mr. Fields and -- to get my portion of that \$500 than to just
15 give them to them and say try to return the favor the next
16 time. But the agreement is absolutely silent as to who pays
17 for the documents.

18 Let me just touch on the four requests that do appear
19 in Georgia-Pacific's motion as my fourth point why the motion
20 ought to be denied.

21 I will tell you, Judge, I am like Mr. Fields, not
22 familiar with the other requests to International Paper that
23 are not cited in the motion. The number of discovery requests
24 in this case is mind boggling. The requests for production now
25 number in the thousands. There are countless requests for

1 production. So if I don't have the specific ones in front of
2 me, I really can't comment on them. But as to those four, they
3 are indeed so overbroad as to never contemplate these MDEQ
4 documents. For example, the first one listed in their brief,
5 number 54, "All Documents relating to the use or presence of
6 CCP broke, CCP trim, or postconsumer waste containing CCP at
7 each of the Fourteen Mills and Other Mills."

8 The Michigan Department of Environmental Quality is a
9 governmental agency that is not looking at the use or presence
10 of CCP, carbonless copy paper, in broke or trim. These, except
11 to the extent that it's ubiquitous in the river and therefore
12 would encompass every document in this case. And that's true
13 for the other ones, "Documents relating to sludge and
14 wastewater disposal practices," "Documents relating to any
15 investigation of the source of CCP."

16 Those are such all encompassing documents that they
17 are not, you could say how about documents from the MDEQ if you
18 wanted to be a little specific. But we don't have that request
19 in front of us. These are just over arching requests that
20 don't call for this. And clearly Georgia-Pacific, at least
21 tacitly, concedes that by leading with the argument that, hey,
22 we have got this private agreement in Phase I to produce all
23 these documents.

24 And, again, the notion that they could somehow end run
25 the agreement that or that NCR made with, look, anybody who

1 wants these come and pay up, by saying after the fact I don't
2 want to pay but there are outstanding requests, requests that
3 predate NCR's offer to copy these documents and share the
4 costs, and they are somehow entitled to them, and by the way,
5 not required to pay for the cost of them, seems to me to be
6 disingenuous.

7 The last point. Even if somehow these documents were
8 covered by one of these very, very broad requests, Judge, I
9 don't believe under the Federal Rules that obviates the need
10 for Georgia-Pacific to share in the cost of copying them.
11 Nowhere in the rules does it say because I have an obligation
12 to produce the documents do I somehow, do they get them for
13 free necessarily. And here the parties have already paid;
14 these parties, NCR and International Paper, paid \$50,000 for
15 the copying of these documents. It's just fair and equitable
16 that Georgia-Pacific should have to pay for them too.

17 I'm a little surprised that Georgia-Pacific has
18 brought this motion, Judge, for this reason. And then I'll sit
19 down. This case is about hundreds of millions of dollars.
20 Georgia-Pacific claims it's already spent \$110 million in
21 cleaning up the Kalamazoo River. There have been over a
22 hundred million dollars spent cleaning up the river by parties
23 that are now in bankruptcy. Georgia-Pacific seeks from the
24 defendants in this case that we contribute some portion to that
25 cleanup, and by the way, they also want future costs which

1 could dwarf the amount of past costs in this case. In this
2 case the cleanup of this river could reach numbers that start
3 with a B. as opposed to an M. We're here today about \$16,000.
4 That's Georgia-Pacific's share for these documents. And I got
5 to tell you, I did not come from Cleveland just for this
6 motion. I wouldn't have done that to my client. I was in a
7 deposition in this case in Seattle on Monday, I've got a
8 deposition here in Grand Rapids tomorrow. And was actually
9 cheaper for my client to come here so that I could without
10 having to go back home and burden Mrs. Parker with my presence.
11 So I came here directly. Otherwise, I wouldn't even have come
12 for this motion.

13 But literally, if Georgia-Pacific is concerned about
14 getting --

15 THE COURT: I have to say I was kind of curious about
16 that. If I had seen one more attorney in this room when I
17 walked in, I was trying to mentally multiply your hourly rates,
18 which I don't know but I assume is in the atmosphere somewhere
19 far above my pay grade. Times of flight costs and everything
20 else for what is at issue here. It is a pure victory for
21 whoever wins this.

22 MR. PARKER: Your point is well taken, Judge. If they
23 really need them on an expedited basis for this deposition
24 that's next week, pay the \$16,000. We are talking about a
25 billion dollar case. And, you know, they filed briefs, we have

1 got this argument, and, again, I mean I'm here because I would
2 be here anyway, and I enjoy being in front of Your Honor. But
3 it seems to me that if Georgia-Pacific wants these documents
4 they should simply pay for them. That's the equitable thing to
5 do. That's what NCR has done, that's what International Paper
6 has done. Weyerhaeuser doesn't want the documents so they
7 shouldn't have to pay for them. But for the parties who want
8 them, I think it's pretty clear they should have to pay.
9 Thanks.

10 THE COURT: Thank you. I'll give you a chance to
11 speak. Just give me a moment.

12 MR. BRODY: Absolutely.

13 THE COURT: Counsel, go ahead.

14 MR. BRODY: Your Honor, let's just focus on the
15 discovery requests.

16 THE COURT: Which one?

17 MR. BRODY: The four that we have cited in our brief.
18 Let's just go with what we have there. They said, well, they
19 are overly broad. That could cover anything and everything.
20 But this is a different circumstance than what you typically
21 see in the context of a discovery dispute. We have a finite
22 universe of documents that we are talking about here today.
23 They haven't argued they are not responsive to this. They have
24 just said, well, there are a bunch of other documents that are
25 responsive to that. They have not taken the position, this is

1 IP, that the MDEQ documents are not responsive to the four that
2 we have cited. That alone is enough to grant this motion.

3 With respect to who should pay, we have cited for the
4 Court, the typical default rule that a party bears the costs of
5 responding to discovery. And I think people often use the word
6 ironic incorrectly and maybe I'm doing it here --

7 THE COURT: All right. Let's talk about that last
8 point.

9 MR. BRODY: Yeah.

10 THE COURT: That the party responding bears the cost.
11 Specifically what rule are you pointing to?

12 MR. BRODY: I'm pointing to page 6 of our brief, the
13 citation to the Oppenheimer Fund, the United States Supreme
14 Court case, Your Honor.

15 THE COURT: And what does that say?

16 MR. BRODY: We have cited it for the proposition that,
17 "The default rule is that each party bears its own costs in
18 responding to reasonable discovery demands."

19 THE COURT: And what do you understand that to be when
20 you say reasonable discovery demands? If the costs are
21 \$16,000, is that a reasonable discovery demand?

22 MR. BRODY: We are not asking them to expend \$16,000
23 to respond to our discovery, Your Honor. That's an important
24 distinction here. They made the decision to go and get this
25 universe of documents which they now have. We have propounded

1 discovery requests. Their costs to respond is basically a
2 stamp. All they have to do is send --

3 THE COURT: That's not realistic, is it? You wait for
4 them to get the documents. If you hadn't waited for them to
5 get the documents, there wouldn't be any documents, or for you
6 to get. You would have to go to the MDEQ yourself and pay
7 \$50,000. You're really getting a bargain.

8 MR. BRODY: We wouldn't have paid \$50,000; we wouldn't
9 have paid 16 because we didn't need most of those documents
10 because they were duplicative. That's why we tried to address
11 this on the front end --

12 THE COURT: If you didn't need them, why are you
13 asking for them now?

14 MR. BRODY: No. We don't need the duplicative ones.
15 Which is why we tried to address this on the front end and say
16 let's find a better way than just blanketly copying everything
17 they have got for 50 grand. Because we, Georgia-Pacific, have
18 already produced a number of responsive documents that are in
19 this file.

20 THE COURT: Why do you need the non duplicative
21 documents? You didn't seek to get those yourself from MDEQ.

22 MR. BRODY: I don't know why they weren't sought by
23 Georgia-Pacific from MDEQ, Your Honor. I do not -- I wasn't
24 personally involved in that and I don't have an answer for
25 that.

1 THE COURT: Well, it sounds like you need them or you
2 wouldn't be asking for them. You wouldn't take this Court's
3 time probably to ask for them if you didn't need them.

4 MR. BRODY: Certainly.

5 THE COURT: So if you needed them, you could have
6 incurred the cost of going to MDEQ and asking for them, either
7 in bulk, paid \$50,000, or sort them out yourself one by one and
8 pay whatever costs there would have been. I have no idea what
9 that cost would have been. I doubt you do either. So there's
10 obviously a cost involved. And either you incurred it or the
11 other side incurred it. But to say there's no cost involved
12 simply isn't the case.

13 The other side incurred the cost, and simply to say,
14 well, they can copy it now on a flash drive for a few pennies,
15 is just to ignore the reality of the situation in that somebody
16 had to incur the cost to bring those records into existence so
17 that that flash drive could be made.

18 MR. BRODY: And, Your Honor, I don't know if it's
19 happened in this case previously, but that is often the case
20 where you send a discovery request for any documents the other
21 side has obtained via subpoena or otherwise from any third
22 party, and they get produced and you don't pay whatever they
23 spent to subpoena the records or otherwise obtained them.

24 THE COURT: So sort of a game of chicken, wait to see
25 who is going to get the documents first, and --

1 MR. BRODY: I don't believe that was on anybody's mind
2 going into it, Your Honor. I really don't. I just think --

3 THE COURT: They could have waited to see if you
4 needed the documents --

5 MR. BRODY: We did attempt, like I said, to work this
6 out with them on the front end and that was met with silence.

7 THE COURT: Isn't Mr. Parker's argument rather
8 persuasive that you -- I take that back. Mr. Parker --

9 MR. BRODY: I will not admit that he made a persuasive
10 argument.

11 THE COURT: It was actually Mr. Fields's persuasive
12 argument that you would have been willing to pay for this if
13 the amount had been more limited. But you declined. It sounds
14 like Georgia-Pacific acknowledged that this would have been a
15 costly deal, and NCR was told it would be costly, attempted to
16 defer the costs, Georgia-Pacific thought, well, fine, but we
17 want it to be more limited, so we don't want to participate.
18 But you acknowledge that had it been a more favorable deal we
19 would have entered into it. Doesn't that indicate that in fact
20 there was no agreement as far as these documents were
21 concerned?

22 MR. BRODY: And, again, Your Honor, I think the whole
23 dispute over whether there was or not an agreement arose at the
24 outset of this based on the correspondence we have attached as
25 Exhibit 4 to our brief. We said, hey, you're going to provide

1 these anyway, Mr. Sibley did in his response that he received
2 from Mr. Lisner was, we don't think we are going to do that.
3 And then it went down the road from there.

4 But I -- my point is separate from any agreement
5 between the parties. If they had responsive documents, they
6 are duly bound to produce them, and we're not talking about a
7 burden here other than copying them to a disk and sending them
8 to us. Exhibit 4 is the September 18th e-mail from Mr. Lisner
9 which they say, Cravath says, "We do not believe the agreement
10 refers to Phase II." So that's where they are taking issue
11 with that.

12 So I guess, Your Honor, in conclusion, IP doesn't
13 argue that they are not responsive to the requests that we
14 cited in our briefs. If this agreement had never even been
15 proposed by NCR and they had just gotten the documents for
16 whatever reason, they would have to produce them under the
17 rules and under our discovery requests. And that's what we are
18 asking for here today.

19 THE COURT: So then do I understand you are no longer
20 pursuing your request to NCR or your request to IP under the
21 other discovery requests that you have not set forth in your
22 brief, but you're just relying on these four requests to
23 produce?

24 MR. BRODY: Your Honor, I believe in fairness we are
25 required to do that, that we are required to be limited to

1 what's in our brief under the local rules.

2 THE COURT: All right. So let's focus on those four.

3 And since we're sort of refocusing the motion, I'm
4 going to give Mr. Parker a chance to respond to that.

5 Mr. Parker, what about the Georgia-Pacific argument that under
6 the Oppenheimer case since you are not arguing that the MDEQ
7 documents are not responsive, you have an obligation to produce
8 these documents and you have to bear your own costs in doing
9 that, which are negligible, just by transferring them to a
10 flash drive.

11 MR. PARKER: Judge, let me respond in hopes that
12 perhaps I can one day make a persuasive argument to the Court.
13 I thought I really had one there for a moment. I'm glad you
14 gave it back to me.

15 THE COURT: And you can reiterate the ones you already
16 made because probably slipped right by me.

17 MR. PARKER: No, no, that's all right. Two points.
18 One, I don't believe these documents are responsive to the four
19 requests listed because only to the extent that those documents
20 -- those requests are so broad they would call for every
21 document in the case that's been produced. So none of them ask
22 for the MDEQ documents. None of them are specific enough to
23 address the documents that are at issue here. And there are a
24 lot of documents here, Judge, too. We are talking \$50,000.

25 THE COURT: Why don't you step up here --

1 MR. PARKER: I'm sorry.

2 THE COURT: There are -- also I need to know when the
3 MDEQ documents were obtained and when these requests were made,
4 if you know. Were these requests made before the MDEQ
5 documents came into play?

6 MR. PARKER: You're challenging my memory here, Judge,
7 and I don't want to give you an incorrect answer. The sequence
8 of that I couldn't exactly tell you. Perhaps Mr. Fields can.
9 I know that the -- I believe these requests were made before I
10 got the offer from NCR to pay for half of the or my share of
11 the costs because that's a much more recent development. I
12 don't know when they actually came by these documents.

13 THE COURT: These requests may have been made back on
14 April 18th, according to the Georgia-Pacific brief. Is that
15 correct?

16 MR. BRODY: Yes, Your Honor.

17 THE COURT: Page 5.

18 MR. BRODY: Yes.

19 THE COURT: All right. These requests to produce were
20 made on April 18th of 2014.

21 MR. FIELDS: That's right. And, Your Honor, just for
22 the record, the FOIA request made by NCR to the MDEQ was in
23 February of 2014. I don't know when the records were copied
24 and produced.

25 MR. PARKER: And I believe that to be sometime

1 thereafter because of the bill I got from NCR which I passed on
2 to my client. And that was an event I remember because it was
3 a large, it was a large amount.

4 And, Judge, on the Oppenheimer case, that talks about
5 a default rule. The Court clearly has the power under Rule 26
6 to apportion the costs reasonably among the parties, and to say
7 that because I have now come in to the possession of the
8 documents after I paid NCR \$24,000 that I can then simply copy
9 them on to a flash drive and send them on for no cost or
10 virtually no cost, I think puts form over substance.

11 My client spent \$24,500 getting these documents. And
12 all we're asking Georgia-Pacific is to pay their fair share.

13 This is not the typical motion in front of Your Honor
14 when one party doesn't want to produce documents. We're saying
15 you can have them. You can have them tomorrow if you want.
16 Just pay your fair share. And I think the rules specifically
17 allow Your Honor to dictate that. Even if you were to say, I'm
18 going to order you to produce them because I somehow find these
19 overbroad requests to ask IP, require IP, who, by the way, if I
20 hadn't agreed to share the costs with NCR, I wouldn't have the
21 documents, GP still wouldn't get the documents because now the
22 way this convoluted motion has come they have got to flow from
23 NCR through me to GP. It makes no sense for them not to just
24 pay their fair share.

25 And I'm sure the folks at Cravath 24 hours a day could

1 send those documents to them whenever they agree to pay that
2 money. And I think under Rule 26, you certainly have the power
3 to both order them produced and order GP to pay its fair share
4 if they are going to be produced to them. And that's what I
5 would suggest the Court do.

6 THE COURT: You're not worried about violating
7 Mr. Fields's work product privilege.

8 MR. PARKER: No, I'm not.

9 THE COURT: Doesn't concern you.

10 MR. PARKER: That does not. And I understand what he
11 is saying about work product. He is saying, well, look,
12 apparently we made some selection about these documents and
13 therefore that's work product. When they gave, agreed --

14 THE COURT: If You're not concerned, Mr. Parker, I'm
15 not concerned.

16 MR. PARKER: Thank you, Judge. Okay.

17 THE COURT: All right. We are going to take just a
18 brief recess. I pretty much know what I'm going to do. But I
19 want to take just a moment. So we still have a few minutes
20 before my 10:30. And I am sure -- that's a criminal matter,
21 I'm sure he won't mind waiting. So we'll just take a few
22 moments.

23 THE CLERK: All rise, please.

24 (Recess taken, 10:14 a.m., Resume Proceedings, 10:27
25 a.m.)

1 THE COURT: Once in a while a judge has to do his own
2 legal research. I have a fine, outstanding law clerk who finds
3 himself on jury duty today down in Kalamazoo. And as an
4 officer of the court he has the same obligations the rest of
5 society has. I virtually assured Jim that he would not be
6 selected on jury duty for some obvious reasons, and one perhaps
7 less obvious reason and that is that the prosecutor in the case
8 used to be one of my interns who was supervised by Jim when she
9 was in our office. And if the defense attorneys down there
10 have an ounce of intelligence, they will probably disqualify
11 him because he was her supervisor. Or perhaps not. In this
12 day and age I take nothing for granted. And he's not back in
13 the office yet, so perhaps he has been selected. I tell people
14 that have the opportunity to serve on juries that they should
15 never pass up that opportunity. Never. Particularly lawyers.
16 Because if you ever have the chance, I tell people ten years
17 from now you won't remember what you did yesterday, but you
18 will remember what you did the day you serve on juries, and the
19 insights you gain are fantastic. Besides, it's fun.

20 But I suspect he will get back here and tell me he did
21 not get selected.

22 In any event, I did want to check out one or two
23 things. But to the matter at hand, I have some thoughts.

24 First of all, I said before I don't think it's the
25 function of this Court to try to enforce private agreements

1 reached between the parties about how they are going to proceed
2 on discovery matters, but rather focus on issues that are
3 governed by the Federal Rules of Civil Procedure, and to
4 enforce those rules.

5 But regardless, I find there is no agreement here in
6 Phase II that would pertain, so it becomes a moot point. There
7 was an agreement in Phase I; all the parties acknowledge that.
8 But as to these documents, I don't see a meeting of the minds.
9 And as to the MDEQ documents, they were clearly going to be an
10 expense. They were produced as the result of a FOIA request.
11 NCR was put on notice by the state of the cost; NCR then asked
12 the other parties if they wanted to contribute, and obtain
13 these documents, some said yes, some said no; Georgia-Pacific
14 said if it didn't cost so much we might be interested, but we
15 don't want to pay that much. I think everybody was on notice
16 that these were not under the earlier agreement.

17 And the motion today really seeks to enforce that
18 agreement. That's the thrust or the gravamen of this motion.

19 Now, part of the objection of Georgia-Pacific is that
20 they don't want to pay NCR for what they call its gross
21 inefficiency in copying MDEQ's entire file when only a small
22 fraction of the documents in that file are non duplicative.
23 But ironically it wants the same entire file without pointing
24 out which non duplicative documents it needs stating that to do
25 so would be time consuming and probably they would expedite

1 that. So despite the fact that NCR was grossly inefficient, it
2 wants the same entire file itself at no cost to it.

3 But without incurring any of the costs NCR incurred.

4 The Court also notes that Georgia-Pacific can
5 certainly go to the MDEQ itself to obtain these documents
6 through FOIA, I suppose. Georgia-Pacific has cited the
7 Oppenheimer case, and I suppose that's as good a statement of
8 the rule as any. I will cite it for the record. It states on
9 page 358, "That the presumption is that the responding party
10 must bear the expense of complying with discovery requests, but
11 they may invoke the district court's discretion under Rule
12 26(c) to grant orders protecting them from "undue burden or
13 expense" in doing so, including orders conditioning discovery
14 on the requesting party's payment of the costs of discovery."

15 But here all parties are on equal footing as far as
16 being able to bear these costs. There is no party
17 substantially more able to bear these costs than anybody else.
18 While on some larger level, the parties may not be on equal
19 basis for these purposes, I'm sure they are all able to bear
20 these costs.

21 And the parties that have obtained these records have
22 paid their share and have been forthright in saying if anybody
23 else wants to obtain these records they are readily available
24 at an equal distribution of the costs, at an equal sharing of
25 the costs. Mr. Parker just made that argument. He said they

1 could have these records immediately upon payment of their
2 share of the cost. There is no real argument about work
3 product, nor do I think there could be.

4 And he is willing to make them available even though
5 strictly speaking the motion is addressed to NCR, which has now
6 been really removed from the motion.

7 As I said before, I don't think that this matter
8 should be allowed to interfere with the more important
9 proceedings in this case, and that's that the deposition and so
10 forth continue expeditiously.

11 So I think that Georgia-Pacific probably is entitled
12 to these documents from IP, as long as it pays its fair share.

13 So I will treat this as a motion to compel production
14 of the documents pursuant to these four requests to enforce:
15 54, 63, 67, and 79, provided that Georgia-Pacific pay its fair
16 share of the costs as indicated, which I believe is in the
17 neighborhood of \$16,000.

18 And I believe that could be considered a ruling on the
19 merits of the motion and not simply so that Mr. Parker can hold
20 his head up when he goes home to see Mrs. Parker, although he
21 certainly can do that.

22 MR. PARKER: For the record, Judge, I think I lost.

23 THE COURT: You get your \$16,000.

24 MR. FIELDS: For the record, Your Honor, I would like
25 half of that 16.

1 THE COURT: And half of it goes to NCR. You might
2 have to arm wrestle Mr. Parker, however.

3 MR. FIELDS: He would win.

4 MR. PARKER: Thank you, Judge.

5 THE COURT: Thank you, gentlemen.

6 (Proceedings concluded, 10:38 a.m.)
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C E R T I F I C A T E

I certify that the foregoing is a transcript from the Liberty Court Recording System digital recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

U.S. District Court Reporter

402 Federal Building

Grand Rapids, MI 49503

KATHY J. ANDERSON, U.S. DISTRICT COURT REPORTER